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asked leave to file an amended bill so as to make the pleadings conform to the proof, and the difference between the amended bill and the original bill was so slight that no change in issues directed was necessary, it was error to refuse leave to file the amended bill, though the original bill was sworn to.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 557.]

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AMERICAN LOCOMOTIVE CO. et al. v. HOFFMAN.

June 14, 1906.

[54 S. E. 25.]

**1. Writ of Error—Assignments of Error—Assignment Made in Reply Brief—Review.**—Under Code 1904, § 3464, providing that a petition for a writ of error shall assign errors, assignments made in the reply brief will not be considered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3097.]

**2. Waters and Water Courses—Injuries by Flowage—Liability—Instructions.**—Where, in an action for overflowing land in consequence of the obstruction of a stream by the construction of a fence and gate across the stream and culverts therein, the evidence showed that the overflow occurred by reason of an unusual rainfall and the breaking of a dam and the outpour of a reservoir of water into the stream, an instruction that it was the duty of defendant, in building the fence and water gate and the culverts, to so build them as not to obstruct such extraordinary flows of water as it might reasonably expect would occasionally flow down the stream, and that, if the damage was caused by a volume of water so great that no reasonably prudent man would have been expected to foresee it, defendant was not liable, whether the culverts and fence and water gate were defective, was misleading, as imposing on defendant a higher degree of care in the construction of the culverts and the fence and water gate than the law imposes.

**3. Same—Injuries by Flowage.**—A person constructing a fence and gate across a stream and culverts in the stream in such a manner as not to obstruct the natural flow of the water, including the usual high water, is not liable for injuries to land caused by throwing back the water and overflowing land, and such structures need not be constructed in such a manner as to permit the unobstructed flow of water in times of unprecedented and extraordinary freshets.

**4. Same.**—A person building a fence and gate across a stream and constructing culverts therein is not liable for the overflow of water caused by the breaking of a reservoir or dam over which he had no control, or by an unprecedented downpour of rain precipitating into the stream a flood not reasonably anticipated.

**5. Same—Instructions.**—Where, in an action for overflowing land

by obstructing the water in a stream by the construction of a fence and water gate across the stream and culverts therein, the evidence showed that the land overflowed was liable to overflow by reason of high water in the stream before the fence and gate and culverts were built, an instruction that it was the duty of defendant, in building the fence and gate and culverts, to so build them as not to obstruct such extraordinary flows of water as it might reasonably expect would occasionally flow down the stream, but, if the damage complained of was caused by a volume of water in the stream so great that no reasonably prudent person would have been expected to foresee it, defendant was not liable, was misleading.

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JOHNSON, Treasurer, et al. *v.* TRUSTEES OF HAMPTON NORMAL & AGRICULTURAL INSTITUTE.

June 14, 1906.

[54 S. E. 31.]

**Taxation—Collection of Taxes—Injunction—Adequate Remedy at Law.**—In view of Va. Code 1904, § 567, providing that any person assessed for taxes on land aggrieved by the assessment may apply for relief to the court in which the commissioner of the revenue gave bond, a bill in equity against the county treasurer and commissioner of the revenue, will not lie to enjoin the collection of taxes assessed.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1230-1241.]

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WILKIE *v.* RICHMOND TRACTION CO.

June 14, 1906.

[54 S. E. 43.]

**1. Street Railroads—Injuries to Person on Track.**—In an action for injuries to one struck by a car while walking on the track, the court instructed that, if persons generally walked on the track at that point it was the duty of defendant to exercise reasonable care to discover persons so using the track, and that if defendant's servants, in the exercise of a proper lookout, failed to observe plaintiff's persistence in remaining on the track, and did not then exercise all reasonable care to avoid an accident, defendant was liable. Held, that the instruction was erroneous, because if defendant's servants exercised proper care they had discharged defendant's duty, and it was not liable, though plaintiff's presence was not observed.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 195.]

**2. Same—Contributory Negligence.**—The court instructed that if the injury was caused by the negligence of defendant's servant's and without any greater want of ordinary care and caution on the part of the plaintiff than was reasonably to be expected of him under the